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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/901,907	07/11/2001	Veronique Guillou	210231US0	7859
22850	7590	12/08/2004	EXAMINER	
OBLON, SPIVAK, MCCLELLAND, MAIER & NEUSTADT, P.C.			YU, GINA C	
1940 DUKE STREET			ART UNIT	
ALEXANDRIA, VA 22314			PAPER NUMBER	
			1617	

DATE MAILED: 12/08/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

09/901,907

**Applicant(s)**

GUILLOU ET AL.

**Examiner**

Gina C. Yu

**Art Unit**

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 26 August 2004.  
2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.  
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-24 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.  
6) ☒ Claim(s) 1-24 is/are rejected.  
7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.  
8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.  
10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)  
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_  
4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_  
5) ☐ Notice of Informal Patent Application (PTO-152)  
6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on August 26, 2004 has been entered. The claim rejection made under 35 U.S.C. § 103 (a) as indicated in the previous Office action dated January 28, 2004 is maintained for the reasons of record.

### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

1. Claims 1-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lukenbach (US 6090773) ("Lukenbach") in view of Derian et al. (US6262130 B1) ("Derian").

Lukenbach teaches a conditioning shampoo or body cleanser composition comprising cationic polymers, an amphoteric surfactant, anionic surfactant, and a nonionic surfactant. See col. 1, line 34 – col. 2, line 59. Amphoteric and anionic phosphate surfactants are disclosed in col. 6, line 56 – col. 10, line 46. The example formula in Table 7 comprises 3.6 % by weight of sodium lauroampho PG-acetate phosphate, acrylamidopropyltrimonium chloride acrylamide copolymer,

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acrylates/steareth-20 methacrylate copolymer, and polyquaternium-10. Decyl glucoside, a nonionic surfactant, is used in the amount 3.6 % by weight. See instant claims 5-12, 14. While the "foam height" of the prior art is not explicitly discussed, examiner takes the position that, a composition comprising the same foaming nonionic surfactant used in the instant invention would produce similar foaming property that is within obvious range of the instant claims. The reference teaches that polyquaternium-10 and polyquaternium-7 are preferred conditioning polymers. See col. 10, line 57 – col. 12, line 37; instant claims 13, 16, and 23. The formula also contains glycerin. See also col. 14, line 44 – col. 15, line 2; instant claim 17. The reference further teaches using thickening agents. See col. 14, lines 4 – 27; instant claim 18. The claimed method of using the composition is viewed an expected use of an obvious variation of the prior art. See instant claims 19-22.

While the Lukenbach invention employs cationic polymers containing saccharide such as polyquaternium-10 and guar hydroxypropyl trimonium chloride, the reference teaches that polyquaternium-7 or polyquaternium -6, (cationic polymers devoid of saccharide) are equivalency to these polymers. It is well settled in patent law that it is prima facie obvious to substitute equivalents known for the same purpose. See MPEP § 2144.06. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have substituted polyquaternium 10 and guar hydroxypropyl trimonium chloride, with polyquaternium-7 and/or polyquaternium –6 because of the expectation of successfully producing a cleansing composition with similar conditioning effects.

The term “consisting essentially of” in instant claim 1 is treated same as “comprising” in absence of applicants’ showing that the presence of the unrecited components would materially alter the basic and novel characteristic of the claimed invention. See PPG Industries v. Guardian Industries, 156 F.3d 1351, 1355, 48 U.S.P.Q. 2d 1351, 1355 (Fed. Cir. 1998). Claims 24 and 25 do not exclude other components present in the prior art, such as amphoteric surfactants.

Lukenbach generally teaches alkyl phosphate surfactants, disclosed in col. 10, lines 16 – 42. The reference fails to teach using the specific phosphate surfactants of the instant claims 4 and 16.

Derian teaches aqueous surfactants comprising alkyl phosphate ester salts useful in formulating flowable or pumpable transparent gels. See abstract; col. 1, line 19 – col. 2, line 55. Potassium salt of dodecyl phosphate is disclosed. See instant claims 4 and 16. The reference teaches that the alkyl phosphate ester salts are useful in cosmetic and personal care products because of their foaming properties, detergency, non-irritating properties, form density, stability and skin feel. The reference also teaches that the invention does not require the presence of such undesirable other surfactants or large amounts of co-solvents or alcohols or other additives. See col. 2, lines 26 – 36. The invention, which is pumpable and transparent, is also said to allow minimize the amount of co-solvents or other surfactants. See col. 3, line 10 – col. 4, line 44. Although both references are silent as to the measurement of the actual foam height of the inventions, examiner takes the position that, in view of the fact that prior art

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which meet the limitations of the instant claims, the claimed properties of the instant inventions may be due to the limitations not disclosed in the instant claims.

Given the general teaching of using phosphate surfactants in Lukenbach, it would have been obvious to one of ordinary skill in the art at the time the invention was made to look to the prior art such as Derian for specific phosphate surfactants. The motivation to have modified the Lukenbach composition by substituting the anionic surfactants with the phosphate surfactants of Derian would have been obvious to the skilled artisan because of the expectation of successfully producing a transparent cleansing composition with good foaming properties, detergency, non-irritating properties while minimizing the need of co-surfactants.

#### ***Oath/Declaration***

In the Rule 132 declaration filed on Aug 26, 2004, the data shows a comparison between a composition comprising phosphate surfactant, decyl glucoside, and polyquaternium 47 (devoid of saccharide), and a comparison composition comprising the same components but no cationic polymers at all. While the data shows different numerical values obtained in each of the "sensory criteria" of foam volume, size of bubbles, and density of foam between these two compositions, firstly it is not clear what those numbers represent or how they were measured. Secondly, it is not clear whether these differences would have been obtained by comparing the present invention with a composition comprising a cationic polymer comprising saccharide in the same condition.

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Applicants assert that the Rule 132 declaration filed on April 25, 2002 shows that cationic polymer containing a saccharide group "negatively affects the rinsibility and viscosity of the composition". However, it is noted that in the comparison example, the cationic polymers are not the only variables. While the comparison example using polyquaternium-10 employs 3.35 A.M. (amounts of active material) and 10.5 A.M., respectively, these compounds are used by 6.5 A.M. each in the example using polyquaternium-7 (devoid of saccharide). Thus, it is not clear whether the alleged superior results of rinsibility and viscosity is attributed to of cationic polymers devoid of saccharide as asserted, or due to the other components present in different amounts.

### ***Response to Arguments***

Applicant's arguments filed on August 26, 2004 have been fully considered but they are not persuasive.

Examiner asserts that the collected teachings of the prior arts motivate one of ordinary skill in the art to make the claimed invention, since the claimed cationic polymers are used in personal cleaning composition as in Lukenbach, while Derian teaches the good foaming properties of alkyl phosphate ester and its salts, also to be used in personal care products.

With respect to the alleged superior foaming properties of phosphate surfactant, examiner maintains the position that the results are expected and nonobvious. In response to applicants' assertion that the conclusion of the Office lacks support, examiner respectfully points out that the Derian reference provides the evidence that it was within the knowledge of a skilled artisan at the time of the invention that phosphate

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surfactant produce good foaming properties, detergency, non-irritating properties, foam density, stability and skin feel. The Derian reference also teaches that by using the phosphate surfactant, specifically alkyl phosphate ester salts, there is no need to employ other surfactants or large amounts of co-solvents or alcohols or other additives, which provides motivation and suggestion for the routineer to eliminate unnecessary surfactants (such as those used in Lukenbach) and still achieve desired foaming properties.

### ***Conclusion***

This is a continued examination under 37 CFR 1.114, filed after final rejection. All claims are drawn to the same invention claimed in the earlier application and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the earlier application. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action in this case. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no, however, event will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.



Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gina C. Yu whose telephone number is 571-272-0635.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on 571-272-0629. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Gina Yu  
Patent Examiner

SHENGJUN WANG  
PRIMARY EXAMINER

